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Internal Revenue Service
CC:PA:LPD:PR (Notice 2018-24)
Room 5203
P. O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Notice 2018-24

Ladies and Gentlemen:

This is a comment letter from Ice Miller LLP on Notice 2018-24, concerning the potential expansion of the scope of the Internal Revenue Service ("IRS") Employee Plans Determination Letter Program for individually designed plans for 2019. Ice Miller LLP represents public pension systems with respect to defined benefit and defined contribution plan compliance in more than 35 states. In this regard, we submitted more than 400 governmental qualified plans to the IRS during Cycles C2 and E2 under the prior determination letter program for individually designed plans. In our experience, the cycle concept worked very well for governmental plans and encouraged employers to seek periodic reviews for changes in federal laws, as well as for changes in state and local laws.

Unfortunately, with the elimination of the five-year remedial amendment cycles for individually designed plans, the vast majority of governmental plans no longer have the ability to secure the IRS's review of plan amendments to ensure that they satisfy the Internal Revenue Code's qualification requirements and that they do not adversely affect an existing IRS determination letter. This creates uncertainty and risk for governmental plan sponsors responsible for maintaining the plan's continued legal compliance in an environment in which many state and local governments are considering structural plan changes due to fiscal pressures. Expansion of the Determination Letter Program beyond providing determination letters for initial qualification and qualification upon plan termination will fill a critical void for those plans that seek to ensure voluntary compliance for their legislative amendments.

ACT REPORTS

We believe that it is important to highlight the Advisory Committee on Tax Exempt and Governmental Entities ("ACT") Analysis and Recommendations Regarding Changes to the Determination Letter Program dated June 8, 2016 ("2016 ACT Report"). The 2016 ACT Report summarizes the findings and recommendations of the Employee Plans Subcommittee ("EP Subcommittee") based on its research and analysis of Announcement 2015-19, as well as the results of the public survey the EP Subcommittee conducted for the employee plans community regarding the restructuring of the Determination Letter Program. The 2016 ACT Report also summarizes some of the pertinent comments the employee plans community made with respect to Announcement 2015-19, which were previously addressed in the ACT's Report on the Determination Letter Program dated July 11, 2014 ("2014 ACT Report"). The EP Subcommittee indicates that those earlier statements are even more relevant today. We believe that both Reports offer some very pertinent observations, as well as well-developed suggestions. Based on our representation of large governmental plans, one of the most significant observations which bears repeating is:

The determination letter program continues to be an invaluable resource for employers sponsoring individually designed plans to ensure that plan documents are compliant with the applicable tax qualification requirements. Because of the myriad of qualification requirements and the differing views as to what should be contained in a plan document for compliance purposes, determination letters provide reasonable assurance to diligent plan sponsors that the tax qualification of the submitted plan documents will pass muster upon audit or other IRS compliance review. At the same time, the ability of the IRS to review and approve individually designed plan documents on an ongoing basis plays a critical role in overseeing and policing qualification compliance as these documents are central to plan administration and operations. While up-front review does not assure operational compliance, plan documents that follow the requirements of the Code increase the likelihood that the sponsor will operate the plan in accordance with those requirements. The EP Subcommittee believes that a well-run determination letter program is a key element to an efficient compliance program.

Most significantly, the EP Subcommittee would like to emphasize its commitment to the importance of the determination letter program. Whatever actions the IRS takes in this regard, we urge that it avoid employing measures that will undermine the critical role determination letters play in the qualification compliance process.

(emphasis added).

REQUESTED CHANGES TO DETERMINATION LETTER PROGRAM

With respect to governmental plans, we encourage the Department of Treasury ("Treasury") and the IRS to consider the following modifications to the Determination Letter Program to expand its scope:

- First, the Determination Letter Program should accept determination letter applications for governmental plans after significant state or local law changes, *e.g.*, amendment of a plan to adopt a hybrid plan or another form of plan (*i.e.* a cash balance plan) instead of a traditional defined benefit plan. We are pleased to see this mentioned as one of the examples of a circumstance which the IRS would consider when evaluating whether to accept a determination letter application for certain amended plans.
- Second, the Determination Letter Program should accept determination letter applications in cases where state law fundamentally changes the governmental plan, *e.g.*, closure of plans to new entrants, freezing certain benefit provisions or contribution provisions, and/or creation of a new tier. We assume that the Treasury and the IRS are aware of the significant amendments being made to public plans across the country under the general rubric of "pension reform." In some of those cases, there are new governmental plans being created, which could be submitted under the current determination letter program. However, the prior plan often remains in place for existing participants as of the date of the change, and is frequently amended in significant ways upon its closure to new entrants. Obviously, it is critical that the prior plan remain qualified for decades, while it continues to serve thousands of current members and retirees. In other cases, a new plan is not created as part of pension reform; rather, a new tier within the existing plan is formed. Under the current determination letter program, despite sweeping plan amendments, there is no avenue for a plan with an existing determination letter to receive a current determination letter based on the new plan terms. Access to the determination letter program under the "new approaches to plan design" category would be very helpful in these situations where pension reform is resulting in comprehensive structural changes to an existing qualified plan.
- Third, Notice 2018-24 raises the issue of the inability of certain types of plans to convert to pre-approved plan documents. After talking with a number of our clients, we respectfully believe that the majority of large governmental plans cannot meet the requirements to use the pre-approved program. Rather, many governmental plans, given their statutory and/or regulatory basis, have very individualized plan terms (generally contained in state or local law) that simply cannot be translated to a master plan/adoption agreement format. Additionally, many governmental plans have existed for decades, and plan terms are the result of collective bargaining and/or legislative compromises that, again, cannot be easily distilled to a pre-approved document. Examples include plans that are creatures of state statute and changing

state/city/county political perspectives. While we recognize that the IRS must evaluate value versus the cost of expanding the Determination Letter Program, we believe that it is important to understand that there are currently approximately 14.7 million active participants covered under state and local governmental plans, and approximately 10.3 million retirees in these plans. Furthermore, these government plans collectively administer and invest \$3.74 trillion in assets, and distribute almost \$300 billion in benefit distributions annually.¹

- Fourth, the Determination Letter Program should allow all governmental plans to voluntarily apply for determination letters over regular intervals, perhaps every ten (10) years. As the 2016 ACT Report clearly explained: "A plan sponsor that knows it will be able to apply to the IRS for a determination letter, even if it does not know when, will be better able to make business decisions as how best to function in the interim." This is particularly true of governmental plans because of state legislative cycles and budgeting process requirements.
- Fifth, consider the fact that about 25% of state and local employees are not covered by Social Security, including over 50% of teachers and more than two-thirds of public safety officers. It is critical for Social Security coverage purposes that governmental plans have a mechanism for ensuring they remain qualified for purposes of remaining qualified Social Security replacement plans.

It is our experience that state and local governmental plans work diligently to maintain federal law compliance in politically complex environments. The five-year remedial amendment cycles under the Determination Letter Program have become a critical component in the efforts of state and local governments to maintain their plans in compliance with federal law requirements. For these reasons, we respectfully request the IRS to expand the scope of the 2019 Determination Letter Program as outlined above.

¹ Overview data from U.S. Census Bureau. See Boston College, "Public Plans Data."


On behalf of Ice Miller and our governmental plan clients, we very much appreciate the opportunity to comment on Notice 2018-24. We would be happy to respond to any questions or provide additional information you think would be helpful.

Very truly yours,

ICE MILLER LLP

A handwritten signature in blue ink, appearing to read "Audra Ferguson-Allen".

Audra Ferguson-Allen

A handwritten signature in black ink, appearing to read "Robert L. Gauss".

Robert L. Gauss

A handwritten signature in black ink, appearing to read "Tara Schulstad Sciscoe".

Tara Schulstad Sciscoe